UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

MICHAEL RUSTIN,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 98-175-B***
	)	
KENNETH S. APFEL,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S MOTION TO DISMISS

The defendant has moved to dismiss this action seeking judicial review of a decision of the Appeals Council of the Social Security Administration. Judicial review of this decision is governed by 42 U.S.C. § 405(g), which provides in relevant part:

> Any individual, after any final decision of the Commissioner of Social Security . . . may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow.

The Commissioner has published a regulation interpreting this section of the statute. It provides, again in relevant part:

> Any civil action [seeking judicial review of a decision by the Appeals Council when that it is the final decision of the Commissioner] must be instituted within 60 days after the Appeals Council's notice of denial of request for review of the administrative law judge's decision or notice of the decision by the Appeals Council is received by the individual . . . . For purposes of this section, the date of receipt of notice of denial of request for review of the administrative law judge's decision or notice of the decision

> by the Appeals Council shall be presumed to be 5 days after the date of such notice, unless there is a reasonable showing to the contrary.

20 C.F.R. § 422.210(c).

The notice of the Appeals Council action in this case was mailed on June 17, 1998. Declaration of Ilselore Passalacqua (Docket No. 3) at ¶ 3(a). The defendant contends that the sixty-day period expired on August 21, 1998, a Friday. Defendant's Reply to Plaintiff's Opposition to Defendant's Motion to Dismiss ("Defendant's Reply") (Docket No. 6) at 2.[1] The complaint in this action was filed on August 24, 1998, the following Monday. Docket. The plaintiff makes no attempt to show that he received the notice more than five days after it was mailed, he did not request an extension of the time for filing this action, *see* 20 C.F.R. § 404.982, and he does not seek equitable tolling of the statutory limitations period. Rather, he argues that Fed. R. Civ. P. 6(a) must be applied to the five-day presumption created in the implementing regulation, with the result that the final day for filing of this action was August 24, 1998, the day it was filed.

Rule 6(a) provides, in relevant part:

> In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday . . . . When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

The plaintiff contends that the five-day presumption included in 20 C.F.R. § 422.210(c) is "related

[1] The plaintiff has filed a document entitled "Plaintiff's Reply to Defendant's Reply to Plaintiff's Opposition to Defendant's Motion to Dismiss" (Docket No. 7) without requesting leave of court to do so. The court's local rules make no provision for the filing of such documents, and it will not be considered by the court.

to an applicable statute" because it "is the Commissioner's interpretation of 42 U.S.C. § 205(g) [sic]," Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss (Docket No. 4) at 2, and therefore Rule 6(a) requires that any intermediate Saturdays and Sundays be excluded from the computation of the five days. Because June 17, 1998 was a Wednesday, the five-day period following it included both a Saturday and a Sunday. If the sixty days runs from Wednesday, June 24, 1998, and not from Monday, June 22, 1998, the sixty-day period expired on August 23, 1998, a Sunday, and Rule 6(a) operates to make the filing on the next day, Monday, August 24, 1998, timely.

The defendant takes the position that Rule 6(a) does not apply to agency regulations and that the five-day period is not in any event a statutory period distinct from the sixty-day period, to which a separate application of Rule 6(a) may be computed. Defendant's Reply at 2.

My research has located only one reported case that even mentions the plaintiff's interpretation of Rule 6(a) and 20 C.F.R. § 422.210(c). The court found it unnecessary to decide whether the plaintiff's interpretation is correct. *Parrott v. Commissioner SSA*, 914 F. Supp. 147, 148 n.1 (E.D.Tex. 1996); *see also Parrott v. Commissioner SSA*, 1995 WL 750152 (E.D.Tex. 1995) at *2 & n.2 (underlying decision; noting that "[n]o reported case apples Rule 6(a) to the five-day presumed notice period established in 20 C.F.R. § 422.210(c)").

Rule 6(a) applies to periods of time allowed by "any applicable statute." Because 42 U.S.C. § 405(g) sets a limitations period of 60 days "or within such further time as the Commissioner of Social Security may allow," the five days added by the presumption created by 20 C.F.R. § 422.210(c), the Commissioner's regulation allowing such "further time," may be considered part of a statutory limitations period. The inquiry does not end here, however. The "further time" that

the Commissioner has allowed per the regulation is not a separate period of time, statutory or otherwise. It is *further* time, an extension of the existing statutory period, creating a single, total period of time somewhat longer than that specified by the statute. The regulation merely creates a presumptive date of receipt of notice that may work to the claimant's benefit. It cannot work to the claimant's detriment because the claimant may make "a reasonable showing" that actual receipt occurred more than five days after the mailing of the notice. The statute and the regulation, taken together, establish a single period of limitations, which at most may be 65 days, to which Rule 6(a) may be applied. *See Worthy v. Heckler*, 611 F. Supp. 271, 273 (W.D.N.Y. 1985) (5-day presumption regarding date of receipt not applicable at all where date of receipt is not in dispute).

Because the five-day presumptive addition to the sixty-day period created by section 405(g) is not separately subject to Rule 6(a), and because the total period of time allowed was not less than 11 days — thus rendering inapplicable the Rule 6(a) provision regarding the exclusion of intermediate Saturdays, Sundays and legal holidays — the plaintiff's action was not timely filed and must be dismissed. *O'Neill v. Heckler*, 579 F. Supp. 979, 981 (E.D.Pa. 1984) (court lacks jurisdiction over complaint seeking review of Social Security decision filed one day after expiration of 65-day period). Accordingly, I recommend that the defendant's motion to dismiss be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 1st day of December, 1998.

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David M. Cohen
United States Magistrate Judge